

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 323

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 232

[FRL-6338-9]

Revisions to the Clean Water Act Regulatory Definition of "Discharge of Dredged Material"

AGENCIES: U.S. Army Corps of Engineers, Department of the Army, DOD; and Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) are promulgating a final rule amending a Clean Water Act (CWA) section 404

regulation that defines the term "discharge of dredged material." This action conforms that definition to the results of a lawsuit holding that by asserting jurisdiction over any redeposit of dredged material, including incidental fallback, the Agencies had exceeded our statutory authority under the CWA. Today's action is intended to comply with the injunction issued by the district court in that case. Today's rule responds to the court decision by deleting language from the regulation that was held to exceed our CWA statutory authority and by adding clarifying language.

EFFECTIVE DATE: May 10, 1999.

FOR FURTHER INFORMATION CONTACT: For information on the final rule, contact Mr. John Lishman of EPA at (202) 260-9180 or Mr. Mike Smith or Mr. Sam Collinson of the Corps at (202) 761-0199. For questions on project-specific activities, contact your local Corps District office. Addresses and telephone numbers for Corps District offices can be obtained from the Corps Regulatory

Homepage at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/district.htm>. If you do not have access to the Internet, telephone numbers for Corps District offices can be obtained by calling the National Wetlands hotline at 800-832-7828.

SUPPLEMENTARY INFORMATION:

I. Background

A. Potentially Affected Entities

Persons or entities engaged in discharging dredged material to waters of the US could be affected by today's rule. Today's rule addresses the regulatory definition of "discharge of dredged material," a term which is important in determining what types of activities do or do not require a CWA section 404 permit. As described further below, today's action does not increase regulatory burdens, but rather conforms the language in our section 404 regulations to the outcome of a lawsuit challenging the regulatory definition. Examples of entities that might potentially be affected include:

Category	Examples of potentially affected entities
State/Tribal governments or instrumentalities	State/tribal agencies or instrumentalities that discharge dredged material to waters of the U.S.
Local governments or instrumentalities	Local governments or instrumentalities that discharge dredged material to waters of the U.S.
Industrial, commercial, or agricultural entities	Industrial, commercial, or agricultural entities that discharge dredged material to waters of the U.S.
Land developers and landowners	Land developers and landowners that discharge dredged material to waters of the U.S.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities that are likely to carry out activities affected by this action. This table lists the types of entities that the Agencies are now aware of that carry out activities potentially affected by this action. Other types of entities not listed in the table could also perform activities that are affected. To determine whether your organization or its activities are affected by this action, you should carefully examine the preamble discussion in section II of today's final rule. If you still have questions regarding the applicability of this action to a particular activity, consult the Corps District offices as listed in the preceding FOR FURTHER INFORMATION CONTACT section.

B. Tulloch Rule and Related Litigation

Section 404 of the Act authorizes the Corps (or a State with an authorized permitting program) to issue permits for the discharge of dredged or fill material into waters of the United States. On August 25, 1993 (58 FR 45008), we

issued a regulation (the "Tulloch rule") defining the term "discharge of dredged material" as:

Any addition of dredged material into, including any redeposit within, the waters of the United States. The term includes, but is not limited to the following: * * * any addition, including any redeposit, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.

33 CFR 323.2(d)(1); 40 CFR 232.2.

The American Mining Congress and several other trade associations challenged this regulation. On January 23, 1997, the U.S. District Court for the District of Columbia ruled that the regulation exceeded our authority under the CWA because it impermissibly regulated "incidental fallback" of dredged material.¹ The court concluded that incidental fallback is not subject to the CWA as an "addition" of pollutants,

and declared the rule "invalid and set aside." The Court also enjoined us from applying or enforcing the regulation. The government appealed the court's ruling and, on June 19, 1998, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the district court's decision.² *American Mining Congress v. United States Army Corps of Engineers*, 951 F.Supp. 267 (D.D.C. 1997); *aff'd sub nom, National Mining Association v. United States Army Corps of Engineers*, 145 F.3d 1339 (D.C. Cir. 1998) ("NMA").

II. Today's Rule

Today's rule modifies our definition of "discharge of dredged material" in order to respond to the Court of Appeals' holding in *NMA*, and is intended to comply with the district court's injunction. The D.C. Circuit

¹Incidental fallback results in the return of dredged material virtually to the spot from which it came. See, *NMA*, 145 F.3d at 1403.

²The *NMA* decision did not address the definition of "discharge of fill material" (33 CFR 323.2(f); 40 CFR 232.2), and thus did not affect the regulation of discharges of fill material, nor are the Agencies altering that definition in today's rulemaking.

found that the Tulloch rule changed the prior regulatory regime by regulating incidental fallback for the first time. 145 F.3d at 1402. The court found that the rule accomplished this result by defining "discharge" to include "any redeposit" of dredged material. See, 145 F.3d at 1403 ("It is undisputed that by requiring a permit for 'any redeposit' the Tulloch rule covers incidental fallback") (emphasis in original) (citation omitted). The court concluded that incidental fallback is not an "addition" of a pollutant, and that, therefore, our assertion of authority to regulate any redeposit of dredged material exceeded our statutory authority. 145 F.3d at 1405 ("We hold only that by asserting jurisdiction over 'any redeposit,' including incidental fallback, the Tulloch rule outruns the Corps's statutory authority") (emphasis in original). To conform our regulation to this holding we have made two modifications to the rule. First, today's rule deletes use of the word "any" as a modifier of the term "redeposit." Second, today's rule expressly excludes "incidental fallback" from the definition of "discharge of dredged material."

Today's rule does not alter the well-settled doctrine, recognized in *NMA*, that some redeposits of dredged material in waters of the United States constitute a discharge of dredged material and therefore require a section 404 permit. See 145 F.3d at 1405 ("But we do not hold that the Corps may not legally regulate some forms of redeposit under its section 404 permitting authority."); 145 F.3d at 1405, n.6 (recognizing that "a redeposit could be an addition to [a] new location and thus a discharge").

Deciding when a particular redeposit is subject to CWA jurisdiction will require a case-by-case evaluation, based on the particular facts of each case. Judicial decisions have established, and the D.C. Circuit recognized in *NMA*, that redeposits associated with the following are subject to CWA jurisdiction: mechanized landclearing, redeposits at various distances from the point of removal (e.g., sidecasting), and removal of dirt and gravel from a streambed and its subsequent redeposit in the waterway after segregation of minerals. 145 F.3d at 1407. See also, *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897 (5th Cir. 1983) (mechanized landclearing requires section 404 permit); *United States v. M.C.C. of Florida*, 772 F.2d 1501 (11th Cir. 1985), *vacated on other grounds*, 481 U.S. 1034 (1987), *readopted in relevant part on remand*, 848 F.2d 1133 (11th Cir. 1988) (redeposit of river bottom sediments on adjacent sea grass beds is an "addition"); *Rybachek v. EPA*, 904 F.2d

1276 (9th Cir. 1990) (resuspension of materials by placer miners as part of gold extraction operations is an "addition of a pollutant" under the CWA subject to EPA's regulatory authority); *NMA*, 951 F.Supp. at 270 ("Sidecasting, which involves placing removed soil alongside a ditch, and sloppy disposal practices involving significant discharges into waters, have always been subject to section 404").

Determining whether a particular redeposit constitutes incidental fallback and, under the court's decision is not subject to section 404, will also require evaluation on a case-by-case basis. The *NMA* decision indicates incidental fallback "* * * returns dredged material virtually to the spot from which it came." 145 F.3d at 1403. It also describes incidental fallback as occurring "when redeposit takes place in substantially the same spot as the initial removal." 145 F.3d at 1401. Similarly, the district court described incidental fallback as "the incidental soil movement from excavation, such as the soil that is disturbed when dirt is shoveled, or the back-spill that comes off a bucket and falls back into the same place from which it was removed." 951 F.Supp. at 270.

The court in *NMA* recognized that the CWA "sets out no bright line between incidental fallback on the one hand and regulable redeposits on the other" and that "a reasoned attempt to draw such a line would merit considerable deference." 145 F.3d at 1405. We have not attempted to draw such a line here. Nor have we evaluated (as we did when promulgating the Tulloch rule) the complex legal, factual and policy questions associated with interpreting the reach of the CWA. Rather, we have promulgated today's rule to comply with the injunction issued in *NMA*, and as described below, will expeditiously undertake notice and comment rulemaking that will make a reasoned attempt to more clearly delineate the scope of CWA jurisdiction over redeposits of dredged material in waters of the U.S. In the interim, we will determine on a case-by-case basis whether a particular redeposit of dredged material in waters of the United States requires a section 404 permit, consistent with our CWA authorities and governing case law. Entities that are engaging, or intend to engage, in activities in waters of the U.S. that may result in a "discharge of dredged material" as that term is defined in today's final rule are hereby given notice that the agencies intend to regulate those activities that we find, based on the particular circumstances,

would result in an addition of pollutants to waters of the U.S.

III. Future Notice and Comment Rulemaking

As explained in the preamble language accompanying the issuance of the Tulloch rule (57 FR 26894 (June 16, 1992); 58 FR 45008 (August 25, 1993)), some small volume discharges associated with mechanized landclearing, ditching, channelization, or other excavation activities were not consistently subject to environmental review under the pre-Tulloch regulations even though waters of the U.S., including wetlands, were destroyed or degraded. By using specialized dredging and disposal techniques some developers sought to use a loophole in those regulations to convert wetlands without the need to obtain a CWA section 404 permit. The section 404 environmental review process is not aimed at preventing development, but instead is designed to avoid unacceptable adverse environmental impacts, and to the extent adverse impacts cannot be avoided, assure they are appropriately minimized or mitigated.

The Agencies are particularly concerned that, without further action to clarify the definition of "discharge of dredged material," large-scale destruction of wetlands could occur, resulting in increased flooding or runoff and harm to neighboring property, pollution of streams and rivers, and loss of valuable habitat. Moreover, available information indicates that such losses are already occurring. Accordingly, the Agencies will expeditiously undertake additional notice and comment rulemaking in furtherance of the CWA's objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Additionally, the *NMA* court recognized that the CWA "sets out no bright line between incidental fallback on the one hand and regulable redeposits on the other" and that "a reasoned attempt to draw such a line would merit considerable deference." (145 F.3d at 1405). Further rulemaking thus is appropriate not only to ensure that the Nation's wetlands and other waters of the U.S. will continue to receive the protection required by section 404 of the CWA, but also to enhance clarity, certainty, and consistency in determining what activities are subject to section 404 in light of the *NMA* decision.

IV. Related Statutes and Executive Orders

A. Findings Under 5 U.S.C. 553

Under the Administrative Procedure Act (APA), 5 U.S.C. 553, agencies are required to publish a notice of proposed rulemaking and provide an opportunity for the public to comment on any substantive rulemaking action. Notice and comment is not required, however, when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

5 U.S.C. 553(b)(3)(B).

Today's rule merely conforms the language in our section 404 regulations to the current status of those regulations after the *NMA* case. The district court judgment, as affirmed by the D.C. Circuit, invalidated application of our regulation to incidental fallback and enjoined us from applying or enforcing the rule. By expressly excluding incidental fallback from the definition of "discharge of dredged material," today's revisions conform the regulations to reflect the legal status quo in light of the *NMA* decision. Therefore, we find that solicitation of public comment is unnecessary.

Under 5 U.S.C. 553(d)(1) and (3), rules must be published at least 30 days prior to their effective date, except where the rule "grants or recognizes an exemption or relieves a restriction," or where justified by the agency for "good cause." Today's rule, in accordance with the *NMA* decision, removes the requirement for a section 404 permit for incidental fallback in waters of the U.S. Accordingly, today's rule is effective immediately.

B. Paperwork Reduction Act

The Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, is intended to minimize the reporting and record-keeping burden on the regulated community, as well as to minimize the cost of Federal information collection and dissemination. In general, the Act requires that information requests and record-keeping requirements affecting ten or more non-Federal respondents be approved by the Office of Management and Budget (OMB). The current OMB approval number for information requirements related to the CWA section 404 program is 0710-0003 (expires June 30, 2000). Today's rule merely conforms the definition of "discharge of dredged material" to reflect the ruling in the *NMA* case. It does not establish or modify any information reporting, or record-keeping requirements, and

therefore is not subject to the requirements of the Paperwork Reduction Act.

C. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104-113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. Today's rule does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

D. Other Statutes and Executive Orders

Today's rule does not establish any new requirements, mandates or procedures. As explained above, today's rule merely conforms the regulations' definition of "discharge of dredged material" to reflect the judicial decision in the *NMA* case. Because today's rule is a "housekeeping" measure undertaken to conform the regulatory language to that judicial determination, it does not result in any additional or new regulatory requirements. In fact, the judicial determination which it reflects has the practical effect of removing incidental fallback from coverage under the regulations. Accordingly, it has been determined that this rule is not a "significant regulatory action" under Executive Order 12866, and is therefore not subject to review by the Office of Management and Budget. In addition, this action does not impose any enforceable duty, contain any unfunded mandate, or impose any significant or unique impact on small governments as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4). This rule also does not require prior consultation with State, local, and tribal government officials as specified by Executive Order 12875 (58 FR 58093, October 28, 1993) or Executive Order 13084 (63 FR 27655 (May 10, 1998), or involve special consideration of environmental justice related issues as required by Executive Order 12898 (59 FR 7629, February 16, 1994). Because this action is not subject to notice-and-

comment requirements under the APA or any other statute, and because it does not impose any requirements on small entities, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rule is not subject to E.O. 13045 (62 FR 19885, April 23, 1997) because it is not economically significant as defined under E.O. 12866. Further, EPA interprets E.O. 13045 as applying only to those regulatory actions that are based on health or safety risks such that the analysis required under section 5-501 of the Order has the potential to influence the regulation. This rule is not subject to E.O. 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 808 allows the issuing agency to make a good cause finding that notice and public procedure is impracticable, unnecessary or contrary to the public interest. This determination must be supported by a brief statement. 5 U.S.C. 808(2). As stated previously, we have made such a good cause finding, including the reasons therefore, and established an effective date of May 10, 1999. We will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects

33 CFR Part 323

Navigation, Water Pollution Control, Waterways

40 CFR Part 232

Environmental protection, Wetlands, Water Pollution Control.

Dated: April 27, 1999.

Carol D. Browner,

Administrator, Environmental Protection Agency.

Dated: April 30, 1999.

Joseph W. Westphal,

Assistant Secretary of the Army (Civil Works), Department of the Army.

In consideration of the foregoing, 33 CFR Part 323 and 40 CFR Part 232 are amended as set forth below:

33 CFR CHAPTER II—CORPS OF ENGINEERS, DEPARTMENT OF THE ARMY

PART 323—[AMENDED]

1. The authority citation for Part 323 continues to read as follows:

Authority: 33 U.S.C. 1344.

2. Amend section 323.2(d) as follows:

a. In the first sentence of paragraph (d)(1), remove the words “any redeposit of dredged material” and add, in their

place, the words “redeposit of dredged material other than incidental fallback”.

b. In paragraph (d)(1)(iii), remove the words “any redeposit,” and add, in their place, the words “redeposit other than incidental fallback,”.

c. In paragraph (d)(2), add at the end thereof a new paragraph (d)(2)(iii) to read as follows:

§ 232.2 Definitions.

* * * * *

(d) * * *

(2) * * *

(iii) Incidental fallback.

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40 CFR CHAPTER I—ENVIRONMENTAL PROTECTION AGENCY

PART 232—[AMENDED]

3. The authority citation for Part 232 continues to read as follows:

Authority: 33 U.S.C. 1344.

4. In § 232.2 the definition of “discharge of dredged material” is amended as follows:

a. In the first sentence of paragraph (1), remove the words “any redeposit of dredged material” and add, in their place, the words “redeposit of dredged material other than incidental fallback”.

b. In paragraph (1)(iii), remove the words “any redeposit,” and add, in their place, the words “redeposit other than incidental fallback,”.

c. In paragraph (2), add at the end thereof a new paragraph (2)(iii) to read as follows:

§ 232.2 Definitions.

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Discharge of dredged material * * *

(2) * * *

(iii) Incidental fallback.

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